No. 22,715

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TERRY COACH INDUSTRIES, INC.,
Respondent.

On Petition for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat.

136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order (R. 19-20, 28)[2] issued against respondent on June 30, 1967. The Board's decision and order are reported at 166 NLRB No. 76. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in El Monte, California where respondent is engaged in the manufacture and distribution of travel trailers. No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Section 8(a)(1) of the Act by refusing to reinstate employee Willie H. Smith at the conclusion of a protected economic strike in which he took part. The underlying facts are as follows:

On May 3, 1966, a number of the Company's employees went on strike to obtain higher wages (R. 11; Tr. 4, 7-12). On the same day, the advice of the Union[3] was sought and picket signs were later obtained at the union hall (R. 11; Tr. 14-15, 18-19). Picketing began the next day (R. 2; Tr. 20).

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[1] Pertinent provisions of the Act are set forth in Appendix B, *infra,* p. B-1.

[2] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] Industrial Carpenters Union, Local 530, United Brotherhood of Carpenters & Joiners of America, AFL-CIO.

On May 4, several of the pickets stopped a lunch truck, which serviced the employees in the plant, as it emerged through the main gate of the plant (R. 11; Tr. 29-30). While the truck was stopped the driver had a conversation with Smith and another employee during which Smith was heard to say "You better not come back tomorrow, you chicken shit" (R. 11; Tr. 74-75, 87). Thereafter someone shouted that Production Manager Brewster was calling the police and the pickets moved aside and the truck left (R. 11; Tr. 108).

About 7:30 a.m. on the morning of May 5, a group of six or eight strikers, including employees Smith, Vincent and McKee, were picketing in an alleyway leading to a parking lot in back of the Company's plant (R. 14; Tr. 57). When employee Rakow approached the picket line the pickets moved out of his way and he proceeded through the line to the parking lot (R. 14; Tr. 58). As he passed through the line he heard a voice, which he recognized as Smith's, call him a "bastard" (R. 14; Tr. 58).

On the same day, Manager Brewster was informed by his assistant that the Hare Window Company had advised him by telephone that pickets had refused to permit their truck to enter the plant (R. 15; Tr. 103). The assistant, on Brewster's instruction, requested Hare Window to instruct its driver, then a block from the Company's plant, to return (R. 15; Tr. 128). When the truck returned the pickets stopped it again (R. 15; Tr. 129), Brewster went over to the truck and told the driver to proceed (R. 15; Tr. 103-104). When the driver did so all of the pickets except Smith stepped aside (R. 15; Tr. 104). When Brewster told Smith to "move or else" Smith stepped aside and the truck proceeded into the plant (R. 15; Tr. 104).

On May 11, on advice of the Union, the strikers, including Smith, presented themselves at the Company's plant and unconditionally offered to return to their jobs

(R. 11; Tr. 25-26). They were told by the Company that they would be notified as soon as places could be found for them at the plant (R. 11; Tr. 25-26). That evening Smith received a telegram from the Company notifying him that he had been discharged because of misconduct during the strike (R. 11; Tr. 26-27). The parties stipulated that Smith had not been replaced at the time he sought reinstatement (R. 11; Tr. 4).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the Company violated Section 8(a)(1) of the Act by denying re-employment to Smith at the conclusion of the strike. In so ruling, the Board agreed with the Trial Examiner that Smith's conduct on the three occasions set forth above were nothing more than "rough trivial incidents" which frequently occur during strikes over vital economic issues and was not sufficiently serious to warrant depriving him of the statutory protection against discharge. The Board's order requires the Company to cease and desist from the unfair labor practice found, to offer Smith reinstatement and backpay, and to post an appropriate notice (R. 19-20, 28).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING STRIKER SMITH AT THE CONCLUSION OF A LAWFUL STRIKE, SINCE SMITH HAD ENGAGED IN NO MISCONDUCT DURING THE STRIKE WHICH WOULD WARRANT A FORFEITURE OF THE NORMAL STATUTORY PROTECTION

Section 7 and 13 of the Act grant employees the right to strike, picket, and engage in other "concerted activities for the purpose of collective bargaining or other mutual

aid or protection." Settled law, therefore, prohibits an employer from discharging economic strikers or denying them reinstatement at the conclusion of a strike, unless they have been previously replaced.[4] It is undisputed in this case that the Company discharged striker Smith at the conclusion of the strike and that Smith's job had not previously been filled. The Company contends, however, that Smith engaged in misconduct on the picket line in May 1966 which justifies the refusal to reinstate him.

It is true, of course, that not all forms of conduct literally within the terms of Sections 7 and 13 remain entitled to statutory protection. In deference to the rights of employers and the public, the Board and the courts have acknowledged that some forms of misconduct occurring in the course of a strike disqualify the striker from protection against discharge. Thus, strikers have been deemed to lose the Act's protection where they seized the employer's property (*N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240), or engaged in acts of "brutal violence" against a non-striker (*N.L.R.B. v. Kelco Corp.*, 178 F.2d 578 (C.A. 4)).

At the same time, it is clear that not every impropriety committed in the course of a strike deprives the employee of the protective mantle of the Act. It has long been held that minor acts of misconduct "must have been in the contemplation of Congress when it provided" for the right to strike. *Republic Steel Corp. v. N.L.R.B.*, 107 F.2d 472, 479 (C.A. 3). As was stated in *N.L.R.B. v. Illinois Tool Works*, 153 F.2d 811, 815-816 (C.A. 7):

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[4] *N.L.R.B. v. MacKay Radio & Tel. Co.*, 304 U. S. 333, 344-346; *N.L.R.B. v. Globe Wireless Ltd.*, 193 F.2d 748, 750 (C.A. 9); *N.L.R.B. v. McCatron*, 216 F.2d 212, 215 (C.A. 9), cert denied, 348 U.S. 943 *Phaostron Co.*, 344 F.2d 855, 858-859 (C.A. 9).

> [C]ourts have recognized that a distinction is to be drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct 'in a moment of animal exuberance' (*Milk Wagon Driver Union v. Meadow-Moor Dairies, Inc.*, 312 U. S. 287, 293) or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employees unfit for further service [citations omitted], and that it is only in the latter type of cases that the courts find that the protection of the rights of employees to full freedom in self-organizational activities should be subordinated * * *.

And as the Court of Appeals for the Seventh Circuit has further held (*N.L.R.B. v. Thor Power Tool Co.*, 351 F.2d 584, 587):

> The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect * * * Initially, the responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not be disturbed.

On the facts of record, it is submitted, the Board was fully justified in concluding that Smith's misconduct was not of a sufficiently serious nature to render him unfit for further service in the Company's plant. None of the three incidents found by the Trial Examiner involved physical violence or destruction of property. The brief stoppage of the Hare truck; the threat, never carried out, to the lunch truck driver; and the obscene remarks made to the lunch truck driver and to employee Rakow after

he had crossed the picket line are typical of the "trivial rough incident" or the "moment of animal exuberence"[5] which frequently characterize picket lines particularly where, as here, there are vital economic issues at stake and the striking employees are quite naturally incensed at those who cross the picket line.[6]

Moreover, it is manifest from the Company's own conduct that it did not attach any great importance to such incidents. Thus the Company recalled two other strikers, Vincent and McKee, although it believed that both had participated in the blocking of nonstriking employees attempting to enter its plant (R. 17; Tr. 44-46). And the Company's sole reason for distinguishing between the reinstatement of Vincent and McKee and the refusal to reinstate Smith was not because of any distinction drawn with

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[5] *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.,* 312 U. S. 287, 293.

[6] In addition to the three instances of misconduct which the Trial Examiner found, the Company contended that Smith engaged in other acts of misconduct during the strike which justified its refusal to reinstate him. The Trial Examiner's findings were based on his observance of the demeanor of the witnesses and a careful analysis of their testimony. In the three incidents in which he found Smith had engaged in misconduct the Trial Examiner credited the Company's witnesses; where he found that Smith had not engaged in misconduct he credited Smith's denials that the events had occurred. The Board specifically approved of these credibility findings of the Trial Examiner (R. 27). It is well settled that such credibility determinations are peculiarly within the province of the Board and the Trial Examiner and should rarely be disturbed on review. *N.L.R.B. v. Luisi Truck Lines,* 384 F.2d 842, 846 (C.A. 9); *N.L.R.B. v. Local 776 IATSE,* 303 F.2d 513, 518 (C.A. 9), cert. denied, 371 U. S. 826; *N.L.R.B. v. Stanislaus Implement & Hardware Co.,* 226 F.2d 377, 381 (C.A. 9).

regard to the extent of their participation in the blocking of egress to the plant, but because McKee and Vincent were not heard to use profanity (R. 17; Tr. 45). Clearly, such a tenuous distinction lends little credence to the Company's contention that its refusal to recall Smith was motivated by his unfitness for further service in its plant.

For these reasons, the Board's determination that Smith's misconduct did not warrant a forfeiture of his statutory protection was, we submit, a reasonable and appropriate judgment. In similar cases, the courts have affirmed such a result. *Thor Power Tool Corp., supra,* 351 F.2d at 587 (alternate holding); *N.L.R.B. v. Wichita Television Corp.,* 277 F.2d 579, 585 (C.A. 10), cert. denied, 364 U. S. 871; *N.L.R.B. v. J. Mitchko, Inc.,* 284 F.2d 573, 577 (C.A. 3); *N.L.R.B. v. Efco Mfg. Co., Inc.,* 227 F.2d 675, 676 (C.A. 1), cert. denied, 350 U. S. 1007; *N.L.R.B. v. Cambria Clay,* 215 F.2d 48, 54 (C.A. 6); *N.L.R.B. v. Longview Furniture Co.,* 206 F.2d 274, 275-276 (C.A. 4); *N.L.R.B. v. Coal Creek Coal Co.,* 204 F.2d 579, 581 (C.A. 10); *N.L.R.B. v. Wallick,* 198 F.2d 477, 484-485 (C.A. 3); *Kansas Milling Co. v. N.L.R.B.,* 185 F.2d 413, 420 (C.A. 10); *Illinois Tool Works, supra,* 153 F.2d at 815-816; *Republic Steel Co., supra,* 107 F.2d at 479; *N.L.R.B. v. Stackpole Carbon Co.,* 105 F.2d 167, 176 (C.A. 3), cert. denied, 308 U. S. 605.

CONCLUSION

For the reasons stated, the Board's order should be enforced in full.

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June 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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APPENDIX A

Pursuant to Rule 18(a)(f) of the Rules of this Court: Exhibits in the instant case.

(Page references are to the transcript of testimony):

General Counsel's Exhibits

No.	Identified	Received in Evidence
1(a) through 1(h)	4	4

* * *

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

LIMITATIONS

Sec. 13. Nothing in this Act, except as specially provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

* * *